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No. 91-1341

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THANH VONG HOAI, JOHN D. HEMENWAY, DAVID HEMENWAY,

Petitioners,

v.

THANH VAN VO, MILLARD F. OTTMAN, DAVID C. ROSEMAN, JONES, DAY, REAVIS & POGUE, J. GORDON FORESTER, JR., GEOFFERY WAGNER, JOSEPH ZULLI, SUN REFINING & MARKETING COMPANY, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENTS MILLARD F. OTTMAN, DAVID C. ROSEMAN, JONES, DAY, REAVIS & POGUE'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether a valid claim under 42 U.S.C. § 1983 may be stated against private attorneys who represented private litigants in the preliminary stages of a still-pending state court action, where (a) there is no allegation that the attorney defendants conspired with any public official to deprive plaintiffs of any federal right, (b) there is no allegation that the attorney defendants acted pursuant to any law, rule or custom that is unconstitutional, and (c) it *is* alleged that the attorney defendants' conduct violated state law.

Whether, in the absence of any allegation of a class-based, invidiously discriminatory animus, a valid claim may be stated under 42 U.S.C. § 1985(3).

Whether leave to amend a concededly defective complaint was properly denied where (a) no request for leave to amend was made until months after the case was dismissed and an appeal of the dismissal had been filed, (b) the complaint's deficiencies are not attributable to new facts or a change in the law, and (c) such deficiencies cannot be cured by amendment.

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BRIEF FOR RESPONDENTS JONES, DAY, REAVIS & POGUE, MILLARD F. OTTMAN AND DAVID C. ROSEMAN

STATEMENT OF THE CASE

At issue in this case is whether petitioners' complaint states a valid cause of action under 42 U.S.C. § 1983 and 42 U.S.C. § 1985(3). Petitioners claim a deprivation of

civil rights based upon respondents' alleged abuse of District of Columbia procedure during the initial phase of prior litigation between Thanh Van Vo ("Vo"), and Thanh Vong Hoai ("Hoai") and Sun Refining & Marketing Co., Inc. ("Sunoco").[1]

The District Court dismissed petitioners' case for failure to state a claim upon which relief can be granted. *Hoai v. Vo,* Civ. Action No. 89-2397 (D.D.C. Oct. 2, 1990), *reprinted in* Petitioners' Appendix ("A-") at 27. The section 1983 claim was dismissed on the ground that the Complaint fails to allege facts which could support a finding that respondents, all private parties, acted "under color of" law in committing the challenged conduct. The section 1985(3) claim was dismissed on the ground that the complaint does not allege the existence of a

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[1]That litigation, *Vo v. Hoai*, Civ. Action No. 7075-86 (D.C. Sup. Ct.) (the "state court action"), which concerns Hoai's right to operate a gas station franchise, is still pending. However, as discussed below, the events in the state court action complained of here -- specifically, the entry of a ten-day temporary restraining order directing petitioners to return possession of the gas station to Vo and a consent order under which Sunoco agreed to continue to supply gas to the station while its ownership was in dispute -- had long since expired when the present action was filed. The District of Columbia procedure that respondents allegedly abused in the state court action was repealed years before this action was filed. In addition, Vo's franchise, contested by Hoai in the state court action, already had expired when this suit was brought. Moreover, in a separate action, (*Hoai v. Sun Refining & Marketing Co.*, Civ. Action No. 87-2456 (D.D.C.)), which was filed before this one, Hoai has obtained a judgment and a damage award against Sunoco for wrongfully terminating, by means of the same consent order, the franchise. Thus, the abuses alleged here (a) could have been cured in the same proceeding in which they were committed, (b) are largely moot, and (c) already have been redressed in a separate action.

conspiracy motivated by a class-based, invidiously discriminatory animus. Petitioners appealed the dismissal and the Court of Appeals affirmed, upholding in all respects the reasoning of the District Court. *Hoai v. Vo*, 935 F.2d 308 (D.C. Cir. 1991), A-1.

The standards governing when the conduct of private parties may be actionable under 42 U.S.C. § 1983 and 42 U.S.C. § 1985(3) are well established by the decisions of this Court, and have been followed by all of the Circuits. The pleading requirements applicable to claims brought under these statutes, which requirements reflect these recognized limitations on availability of relief, are similarly well-settled. The instant ruling by the Court of Appeals is entirely consistent with this long-standing precedent. Petitioners' eleven "questions presented," which distort the Court of Appeals' ruling and the bases therefor, state no legitimate reason for reversing that ruling. Therefore, the petition for writ of certiorari should be denied.

A. Background Facts

1. The State Court Action and the Temporary Restraining Order

On August 28, 1986, Vo, then represented by respondents Jones, Day Reavis & Pogue, Milland F. Ottman, and David C. Roseman (collectively, the "Jones, Day Defendants"), filed the state court action.[2] Vo

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[2]The Jones, Day defendants served as Vo's counsel at the very beginning of the state court action; respondent Robert Pleshaw substituted in as Vo's counsel in early 1988.

alleged in that action, *inter alia*, that Hoai and the Hemenways had wrongfully and forceably evicted Vo from his Sunoco service station.[3] Vo concurrently filed and served upon all defendants a motion for a temporary restraining order ("TRO"). On August 29, 1986, after a two-day evidentiary hearing at which Hoai and the Hemenways testified, the Superior Court granted Vo's motion for a TRO. *See Vo v. Hoai*, Civ. Action No. 7075-86 (D.C. Sup. Ct. Aug. 29, 1986), A-461; Complaint, ¶ 33, A-388. The order required, *inter alia*, that Hoai and the Hemenways return possession and occupancy of the station to Vo, and that Sunoco continue to supply Vo with petroleum products and permit him to operate the service station under the terms of the existing franchise agreement between Vo and Sunoco. *Id.*

Vo did not seek further injunctive relief against Hoai or the Hemenways, and the TRO expired with respect to them on September 8, 1986. In order to maintain the operation of the service station, Vo entered into a "merely private agreement" with Sunoco, Complaint, ¶ 43, A-395, which temporarily extended the TRO only as to Sunoco. A-461. The stipulated extension of the TRO with respect to Vo and Sunoco (the "consent order") was signed by the Superior Court on September 8, 1989. It expired, as did the franchise agreement contested by Vo and Hoai, on March 31, 1987.[4]

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[3]*See* Amended Verified Complaint filed in state court action, *reprinted in* Joint Appendix ("J.A") at 138-57.

[4]The consent order was made expressly subject to the Superior Court's final ruling on the merits of the dispute between Vo and Hoai.

Hoai and the Hemenways, who were not parties of the consent order, nonetheless sought an interlocutory appeal of the order, challenging its validity. J.A. 91-137. The Court of Appeals for the District of Columbia dismissed the appeal by the Hemenways as frivolous. *Hoai v. Vo*, No. 86-1323 (D.C. Sup. Ct. Feb. 25, 1988), J.A. 161. While Vo's appeal was still pending, the consent order expired by its own terms, and the District of Columbia Court of Appeals denied Hoai's appeal as moot. *See Hoai v. Vo.*, No. 86-1323 (D.C. Sup. Ct. Mar. 4, 1988), J.A. 162-63.[5]

As noted, the state court action is still pending. No final ruling on the merits has ever been issued in that case. The case has been placed on the suspense calendar at the request of Hoai and the Hemenways.

2. Other Actions

a. The RICO Action

On or about March 23, 1987, Hoai filed a complaint against Vo and others in the United States District Court for the Eastern District of Virginia. That complaint alleged twenty-four counts, including, *inter alia*, ten counts brought under RICO, and one count under 42 U.S.C.

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[5]In August, 1988, petitioners filed a third-party complaint against respondents, among others, alleging, as they do in the present action, that these defendants made misrepresentations to the Superior Court, and had extended the TRO without notice to Hoai. J.A. 176-239. The third-party complaint further alleges that in committing these actions, these defendants had acted "*ultra vires* in violation of" (sic) the rules of the Superior Court. J.A. 216. Petitioners later voluntarily dismissed the Jones, Day defendants from the third party complaint.

§§ 1983, 1985, 1986 and 1988. J.A. 247-379. Many of the allegations of this complaint focused on the same ultimate issue -- Hoai's right to the possession of the Sunoco service action -- that is the subject of the state court action.

On July 2, 1987, the District Court for the Eastern District of Virginia entered an order dismissing the complaint. *See Hoai v. Vo*, Civ. Action No. 87-0294 (E.D. Va. July 2, 1987), J.A. 380.[6]

b. The Petroleum Marketing Practices Act ("PMPA") Action

On or about September 5, 1987, Hoai filed in the United States District Court for the District of Columbia an action under the PMPA, 15 U.S.C. § 2801, *et seq.* against Sunoco. That action, like the present one,

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[6]Despite this dismissal and the fact that the substance of petitioners' RICO complaint was never at issue in the present case, petitioners' recitation of the "background facts" of this case draws heavily from their RICO complaint. *See* Petitioners' Brief ("Br.') at 3, n.1. The allegations of that complaint have no relevance here. The Jones, Day defendants attached to their original motion to dismiss the RICO complaint and certain other public records only to apprise the District Court of petitioners' previous collateral attacks upon the interim rulings and agreements entered in the state court action. Contrary to petitioners' contentions, Br. at 56-57, judicial notice of matters of public record does not convert a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure to a motion under Rule 56. *See, e.g., Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986); 5A C. Wright and A. Miller, *Federal Practice and Procedure*, § 1364, at 475-79 (2d ed. 1990). In any event, the courts below did not look beyond the four corners of the Complaint in assessing its legal sufficiency.

challenged the validity of the TRO and the consent order. The Jones, Day defendants are not parties to that action.

The District Court, in view of the pendency of the prior-filed state court action, initially stayed the PMPA action. Hoai appealed, and the Court of Appeals for the District of Columbia Circuit overturned the stay, noting that the PMPA action would "not unduly interfere with" the state court action because:

> First, Hoai has not sought to attack any judgment of the Superior Court. The Superior Court simply ratified a voluntary agreement between Vo and Sunoco. The consent order did not represent an exercise of the Superior Court's independent judgment and Hoai has not attacked that judgment. Rather, Hoai's sole complaint involves Sunoco's agreement to continue supplying gasoline to Vo rather than to Hoai, not the Superior Court's resolution of the dispute between Vo and Sunoco or between either of those parties and Hoai.
>
> . . . The consent order on its face involved only Vo and Sunoco and did not purport to decide any of the issues involving Hoai. Rather, the Superior Court specifically stated that "[t]his Consent Order shall not be construed to extend the said Restraining Order as to any other defendant."[7]

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[7]*Hoai v. Sun Refining & Marketing Co.*, 866 F.2d 1515, 1519 (D.C. Cir. 1989). Given these findings by the D.C. Circuit in the PMPA case, petitioners were estopped in the present case from characterizing the subject consent order as anything other than "a voluntary agreement between Vo and Sunoco" which "did not represent an exercise of the

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Hoai moved for summary judgment in the PMPA case. By order dated October 2, the District Court granted Hoai's motion with respect to liability. *See Hoai v. Sun Refining & Marketing Co.*, Civ. Action No. 87-2456 (D.D.C. Oct. 1, 1990). A trial on damages was subsequently held, and the jury awarded Hoai $65,000 in compensatory damages.

B. The Proceedings Below

In this case, which is the third independent action in which petitioners have attacked the conduct of the litigants in the state court action, petitioners have added to the roster of defendants the attorneys who represented those litigants. The conduct with which these attorney defendants are charged is completely circumscribed within their representation of the parties to the state court action. The attorney defendants were not, and never have been, parties in interest in that underlying action.

Respondents moved to dismiss the case, and while their motions to dismiss were still pending, petitioners filed two separate motions to stay this case, first for a stay pending the outcome of the PMPA case, which had been

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Superior Court's independent judgment." As shown below, this necessary separation between the actions of the litigants and their counsel, on one hand, and the District of Columbia judiciary, on the other, alleged clearly in the Complaint, precludes attributing respondents' conduct to the District of Columbia, and thus, precludes petitioners from satisfying the "under color of law" requirement of section 1983.

pending for approximately two years when this action was filed, and then for an "indefinite" stay. A-135, 181.

On October 2, 1990, the District Court dismissed the action. See *Hoai v. Vo*, Civ. Action No. 89-2397, Oct. 2, 1990 Mem. Op., A-32.[8] No leave to amend was provided in the District Court's Order; petitioners had not requested such relief. The District Court also directed plaintiffs to show cause why sanctions should not be imposed. *Id.*

On or about November 1, 1990, petitioners filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure to reconsider the District Court's order dismissing the case. On that same date, petitioners filed a Notice of Appeal of the same order. On or about January 4, 1991, petitioners filed a post-dismissal motion for leave to amend the Complaint.

Petitioner's appeal was argued on May 13, 1991. At that time, petitioner's Rule 60(b) motion had not been decided. In affirming the District Court's order of dismissal, the Court of Appeals ruled, as a threshold matter, that the pendency of the Rule 60(b) motion did not bar appellate review of the order -- *i.e.*, that Fed. R. App. P. 4(a)(4) was inapplicable. *Hoai v. Vo*, 935 F.2d at 311-12, A-10-11. The Court of Appeals also rejected petitioners' request, raised at oral argument, for leave to amend the concededly defective Complaint.

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[8]While the District Court did not issue a formal ruling on petitioners' stay motions, it implicitly denied them (or at the least, rendered them moot) by dismissing the action.

Petitioners moved for rehearing *en banc*. On August 6, 1991, the Court of Appeals denied, *en banc*, petitioners' suggestion that the matter be reheard *en banc*. *See Hoai v. Vo*, Civ. Action No. 90-7170 (D.C. Cir. Aug. 6, 1991). By Order dated November 19, 1991, the Court of Appeals denied the petition for rehearing. *See Hoai v. Vo*, Civ. Action No. 90-7170 (D.C. Cir. Nov. 19, 1991) (per curiam).

SUMMARY OF ARGUMENT

I. Dismissal of Count I of the Complaint, which is brought under 42 U.S.C. § 1983, was appropriate because the Complaint fails to allege facts sufficient to support a claim that the Jones, Day defendants, private attorneys representing a private litigant, acted "under color of law," or that the Jones, Day defendants deprived petitioners of any cognizable right under the Constitution or federal statute. Under the plain language of the statute and the ample precedent of this Court, both requirements must be met before a valid claim under section 1983 may be asserted.

II. Petitioners' claim under 42 U.S.C. § 1985(3) (Count II of the Complaint) was properly dismissed because the Complaint does not set forth any facts to support a claim that the Jones, Day defendants acted with a class-based, discriminatory animus. Both Vo, the Jones, Day defendants' client in the state court action, and Hoai are Vietnamese. The only discrimination alleged in the Complaint is directed to a class of franchise holders, which does not fall within the purview of section 1985(3).

III. The Court of Appeals' denial of petitioners' post-appeal request for leave to amend is firmly supported by

the applicable law. Petitioners' request for leave to amend is procedurally defective, and the substantive defects of the Complaint could not, in any event, be cured by amendment.

ARGUMENT

I. THE COMPLAINT FAILS TO STATE A VALID CAUSE OF ACTION UNDER 42 U.S.C. § 1983

There are two fundamental and uncompromising requirements that a plaintiff must meet in order to state a claim under section 1983. *First*, he must allege that the defendant has deprived him of a right that is secured by the Constitution and laws of the United States. *See Hagans v. Lavine*, 415 U.S. 528, 536 (1974); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970). *Second*, he must allege that the defendant deprived him of such a right while acting under color of the law of a state, a territory or the District of Columbia. *See NCAA v. Tarkanian*, 488 U.S. 179, 190 (1988); *Gomez v. Toldeo*, 446 U.S. 635, 640 (1980); *Adickes*, 398 U.S. at 150.[9] The Complaint does not satisfy either of these criteria, and therefore fails to state a claim cognizable under section 1983.

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[9]In addition to the substantive restrictions upon the scope of relief under Title 42, "every . . . circuit has articulated a requirement of particularity in pleading for civil rights complaints." *Hobson v. Wilson*, 737 F.2d 1, 30 & n.87 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *see also Martin v. Malhoyt*, 830 F.2d 237, 258 (D.C. Cir.), *reh'g denied*, 833 F.2d 1049 (1987).

A. The Complaint does not state a valid claim that the Jones, Day defendants acted under color of state law.

Private parties, for purposes of section 1983, may act "under color of" state law in two ways: by conspiracy with public officials, and by wilfully engaging in joint activity with a state or its agents. *See Adickes*, 398 U.S. at 152 (quoting *United States v. Price*, 383 U.S. 787, 794 (1966)); *see also Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 939 n. 21 (1982). The first possibility does not apply here, since, as noted by the courts below, the Complaint explicitly avoids alleging that respondents conspired with District of Columbia officials. *See* Complaint, ¶¶ 41, 42, A-394.

The second possible basis for section 1983 relief against private parties also is unavailing. *First*, there is absolutely no basis alleged in the Complaint for imputing to the District of Columbia either the creation or the "holding out" of the subject consent order, an "independent," "voluntary" and "merely private" agreement, Complaint ¶¶ 38, 43, 45, A-392, 395, 398, respectively. Petitioners are careful to allege, in keeping with the D.C. Circuit's ruling in the PMPA case, that the Superior Court's signature of this agreement did not transform it into an official act of the State.[10] The gravamen of petitioners' claims appears to be that respondents allegedly "held out" this private agreement to

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[10]*See* Complaint, ¶ 43, A-395 (respondents "used the device of getting an unwitting judge of the Superior Court (not the TRO judge) to sign and ratify their independent agreement without any independent judgment by that judge"); ¶ 41, A-394 ("The signing of this 'consent order' merely ratified their independent agreement without any independent judgment of the Superior Court.").

have been sanctioned by the Superior Court, where in fact, it was not. *See id.*, ¶¶ 43, 44, A-395-96.

The emphasis placed by petitioners upon the private nature of the agreement, their obvious attempts to divorce the creation and use of that agreement from any acts of the Superior Court, and the claims that respondents misrepresented the private nature of the agreement to others, are inimical to any notion that respondents' conduct is attributable to the State. By petitioners' own averments, the District of Columbia had no involvement in the private conduct complained of, much less the significant state participation required to meet the "joint activity" requirement. *See Lugar*, 457 U.S. at 927; *Dennis v. Sparks*, 449 U.S. 24, 28 (1980). *Cf. Flagg Bros, Inc. v. Brooks*, 436 U.S. 149, 157 (1978) (lack of overt, official involvement in property deprivation precludes finding of state action).

Second, the Complaint fails to identify a District of Columbia law, rule or custom that might have facilitated the private wrong alleged. The "judge-in-chambers" rule obliquely referred to in the Complaint, which petitioners in subsequent briefing have identified as the now-repealed District of Columbia Superior Court Rule 12-I, cannot fairly be said to authorize, support or encourage the conduct challenged in the Complaint.[11]

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[11]Former Rule 12-I provided as follows:

> The following matters may at anytime be presented for disposition to a judge in chambers designated by the Chief Judge, either *ex parte* or with opposing counsel, as appropriate: Appointment of a special process server; motions with respect to publication of notice

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That it does not expressly prohibit such conduct is not enough to meet the under color of law requirement.

If the lack of any nexus between the Jones, Day defendants' conduct in serving as counsel to Vo in the state court action, on one hand, and any law or involvement of the State, on the other, were not enough to mandate the dismissal of Count I, the Complaint's allegations that their conduct *violated* state law, clearly are. Such allegations abound in the Complaint.[12]

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[11](...continued from previous page)
requirements, judicial approval of settlements involving minors, approval of accounts, motions regarding security for costs, warrants and return of warrants, motions for temporary restraining orders, writs of *ne exeat*, approval of subpoenas for administrative proceedings, orders involving execution upon attachments, and any others matters appropriate for such disposition.

[12]For example, paragraph 34 of the Complaint alleges that "*by false charges and in violation of applicable law*" (emphasis added), defendants deprived Hoai of his right to counsel of his choosing and Hemenway of his right to clients of his own choosing. A-392. In the first of the paragraphs numbered as 43, petitioners allege that "the lawyer defendants held out falsely that a TRO could be extended without notifying the major party in interest," A-394-95, implying that the "truth" is that District of Columbia law dictates that notice be given in that circumstance.

The second paragraphs 43 and 44 of the Complaint allege even more pointedly that respondents violated "the law of the District of Columbia and the practice, rules and custom of the Superior Court of the District of Columbia." Paragraph 43 alleges that such laws and custom *require* that in any proceeding parties must be given adequate notice of actions which "principally" affect them; paragraph 44 alleges that respondents "planned and schemed to evade" those very requirements. A-397. If, as petitioners allege, notice were required

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Lugar holds that an allegation that a defendant acted contrary to state law precludes a claim that the defendant acted "under color of" state law:

> Count two alleged that the deprivation of property resulted from respondents' "malicious, wanton, willful, oppressive [sic], [and] unlawful acts." By "unlawful" petitioner apparently meant "unlawful under state law." To say this, however, is to say that the conduct of which petitioner complained could not be ascribed to any governmental decision; rather, respondents were acting contrary to the relevant policy articulated by the State. Nor did they have the authority of state officials to put the weight of the State behind their private decision, *i.e.*, this case does not fall within the abuse of authority doctrine recognized in *Monroe v. Pape*, 365 U.S. 167 (1961). That respondents invoked the statute without grounds to do so could in no way be attributed to a state rule or a state decision. Count two, therefore, does not state a cause of action under § 1983 but challenges only private action.[13]

In the present case, the allegations of Count I that respondents violated state law are far more explicit than those of *Lugar's* count two. Since "private misuse of a state statute does not describe conduct that can be

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[12](...continued from previous page)
before a temporary restraining order could be extended, then such a matter would not be "appropriate for disposition" in chambers under the former Rule 12-I. Thus, petitioners again allege that respondents have violated that provision.

[13]457 U.S. at 940.

attributed to the State," 457 U.S. at 941, Count I was properly disallowed.

Despite the clear teachings of *Lugar*, petitioners persist in their contention that the same conduct alleged to violate District of Columbia law, can at the same time be committed "under color of" District of Columbia law.[14] Not only is this contention expressly refuted by *Lugar*, it is utterly counterintuitive.

Petitioners' reliance upon *Lugar* is misplaced for several other reasons. Petitioners apparently seek to equate their section 1983 claim with *Lugar's* count one, which challenged the constitutionality of Virginia's pre-judgment attachment statute.[15] Petitioners' attempted analogy fails. *First*, the Complaint does not challenge the constitutionality of any District of Columbia law, rule or custom. To the contrary, the Complaint explicitly alleges that District of Columbia law and the Constitutional requirements of due process are co-extensive.[16]

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[14]Br. at 32-33, 35, 37.

[15]Br. at 30-32.

[16]*See* Complaint, ¶ 43(II), A-397: "The law of the District of Columbia and the practice, rules and custom of the Superior Court of the District of Columbia *as well as* the Due Process clause of the United States Constitution and the right to petition for the redress of grievances enshrined therein require that at any proceeding, no action be taken which principally affects a party to that proceeding without adequate notice to that party and a chance being granted for that party to respond and participate in that process which affects his interests." (emphasis added).

Second, there is no similarity between the District of Columbia's former judge-in-chambers procedure and the pre-judgment attachment procedure challenged in *Lugar*.[17] The District of Columbia Superior Court has its own, well-defined procedures for prejudgment attachment.[18] Vo did not make use of this procedure. No writ of attachment was issued by the Superior Court, in chambers or otherwise. Indeed, any such involvement by that court would be at clear odds with petitioners' allegations that the Superior Court did not place its imprimatur upon the consensual extension of the temporary restraining order. Factually and legally, *Lugar* lends no credence to petitioners' section 1983 claim.

The fact that, with respect to the Jones, Day defendants, the Complaint merely describes the actions of attorneys *qua* attorneys, further undermines the viability of petitioners' section 1983 claim. This Court, as well as the lower courts, uniformly have recognized that privately retained attorneys performing "traditional lawyer functions" on behalf of their clients in private litigation do not act under color of law for purposes of section 1983. *See Polk County v. Dodson*, 454 U.S. 312, 318 (1981).[19]

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[17]*See Lugar*, 457 at 939 n. 21 ("The holding today . . . is limited to the particular context of prejudgment attachment.")

[18]*See* District of Columbia Superior Court Rule 64-I.

[19]*See also McCord v. Bailey*, 636 F.2d 606, 613 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981) ("[l]awyers may be officers of the court, but they are not officers of the state within the meaning of [section 1983]' . . . . In their capacities as representatives of a client in court, private counsel do not act under color of state law") (citations

(continued on next page...)

Were it otherwise, attorneys representing parties in cases where race *is* an issue (which is clearly *not* the case here), would risk Title 42 liability merely by advocating, on behalf of their clients, positions adverse to alleged victims of racism. The ill-defined theory of liability advanced by petitioners, if allowed, would chill vigorous advocacy in cases involving minorities.

B. The Complaint does not state a valid claim that the Jones, Day defendants deprived petitioners of a federal right

Petitioners have failed to meet the second basic pleading requirement applicable to claims under section 1983 -- namely, alleging the deprivation of a federal right. The greivances that petitioners *do* allege concern

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[19](...continued from previous page)
omitted); *Black v. Bayer*, 672 F.2d 309, 314 (3d Cir. 1982) (citing "long line of decisions . . . recognizing that private attorneys do not act under color of state law for purposes of § 1983); *Brown v. Chaffee*, 612 F.2d 497, 501 (10th Cir. 1979) ("[l]awyers do not act under color of state law solely by engaging in private litigation on behalf of their clients"); *Jones v. Jones*, 410 F.2d 365, 366 (7th Cir. 1969), *overruled on other grounds by Beard v. Robinson*, 563 F.2d 331 (7th Cir. 1977), *cert. denied*, 438 U.S. 907 (1978) ("[l]awyers who are not also parties in interest and are engaged in private litigation on behalf of clients do not act under color of state law within the meaning of 42 U.S.C. § 1983."); *Skolnick v. Martin*, 317 F.2d 855, 857 (7th Cir.), *cert. denied*, 375 U.S. 908 (1963); *Page v. Sharp*, 487 F.2d 567, 570 (1st Cir. 1973) ("even under state court appointments, the courts have uniformly held that an attorney, whether appointed or retained, is not acting under color of law."); *Holsey v. Chandler*, 598 F. Supp. 368, 370 (D.D.C. 1984) (no valid claim under § 1983 even though court-appointed counsel was charged with denying the due process rights of his own client).

(1) John Hemenway's right to represent Hoai; (2) David Hemenway's right to work at the service station; (3) Hoai's right to counsel of his choosing; (4) petitioners' right to travel in the vicinity of the service station; (5) Hoai's right to occupy the service station and (6) plaintiffs' due process right to notice of the consent order between Hoai and Sun Refining. On the facts as pled, these so-called "rights" do not exist under the Constitution or federal statute.

There is no federally-sanctioned "right" to represent another in a judicial proceeding, to work at a service station, or to retain a particular attorney in a civil matter.[20] Petitioners' claim to a right of freedom to travel within the vicinity of the service station likewise has no basis in federal law. The only federally recognized "right to travel" derives from Clause 1 of Section 2 of Article 4 of the Constitution, which has been construed to provide that a United States citizen has the right to travel from one state to another and to take up residence in the state of his choice. *See Jones v. Helms*, 452 U.S. 412, 418 (1981). Petitioners' claimed right to "travel within the vicinity of the service station" certainly does not come within that protection.

Hoai's alleged right to occupy the service station is the ultimate issue in dispute in the state court action. The merits of that case still have not been decided. The same

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[20]John Hemenway was disqualified as counsel for Hoai in the state court action because he was named as a defendant in that action.

issue also is in dispute in the PMPA case, and has been decided in Hoai's favor.[21]

Petitioners' allegations that the subject consent order deprived them of due process are belied by the allegations of the Complaint and the public record. As admitted in the Complaint (and determined by the District of Columbia Circuit before this action was filed), none of petitioners was bound by the consent order; rather, it explicitly excluded them from its reach. Complaint, ¶ 39, A-393. Accordingly, neither the existence of the consent order, nor the fact that petitioners were not given advance notice of it, impaired any legal right of petitioners. For example, it did not, and does not, prevent petitioners from exercising any right they may have to pursue their claims and defenses in the state court action. As noted, petitioners appealed the consent order and lost. They were free to pursue in the state court action other forms of relief from the consent order, including, for example, a summary disposition of the merits, but chose not to. Process was not denied petitioners in the state court action; they

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[21]The Complaint does not allege that the Jones, Day defendants violated the PMPA, but states expressly to the contrary: "Hoai does not sue under that federal act, but has done so separately." Complaint ¶ 20, A-381. Such a claim is not available against the Jones, Day defendants since the PMPA applies only to franchisors and franchisees. *See Basales v. Texaco, Inc.*, 516 F. Supp. 655, 662 (D.N.J. 1981) (the PMPA's "coverage does not extend to third parties"); *see also Sanna v. Friendly Service Stations, Inc.*, 593 F. Supp. 493 (D. Conn. 1983). Accordingly, as to the Jones, Day defendants, there was no basis to grant petitioners' motions to stay this case pending the outcome of the PMPA case. *Cf.* Br. at 52-53. The judgment subsequently entered in the PMPA case had no bearing upon the viability of petitioners' claims against the Jones, Day defendants.

simply elected to forego the process that was available. Instead, they have chosen to proliferate, in separate actions, collateral attacks upon the litigants' conduct in the state court action.

Petitioners' due process claim is also untenable because they cannot meet the "state action" requirement which attends the pleading and proof of such a claim. This Court has held that where the right alleged to have been deprived arises under the Bill of Rights of the Constitution, the claimaint "must establish not only that [the § 1983 defendant] acted under color of the challenged statute, but also that its actions are properly attributable to the State. . . ." *Flagg Bros. v. Brooks*, 436 U.S. at 156. *See also Lugar*, 457 U.S. at 936-937 n. 18.

Petitioners have not pled facts that support a finding that the conduct of respondents is "properly attributable" to the District of Columbia. The same factors which preclude a finding that respondents acted "under color of" state law bar any claim that they are "state actors." The state action requirement is not met by "private use of state-sanctioned private remedies or procedures," *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478, 485 (1988), or by the state's acquiesence in defendant's conduct. *Flagg Bros.* 436 U.S. at 165. *See also Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974) ("exercise [by a regulated entity] of the choice allowed by state law where the initiative comes from it and not from the State does not make its action in doing so 'state action'"). State action will not be found absent the "overt, significant assistance of state officials." *Cf. Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2084 (1991)

(citation omitted).[22] Here, petitioners explicitly disavow any significant assistance by the District of Columbia judiciary, and allege that respondents violated state law rather than acted in conformity with it. The absence of state action forecloses any section 1983 claim based upon an alleged violation of petitioners' due process rights.

II. THE COMPLAINT FAILS TO STATE A VALID CLAIM UNDER 42 U.S.C. § 1985(3)

Count II of the Complaint is styled as a section 1985 claim, although it does not specify what subpart of that section petitioners intended to invoke. Because petitioners' conclusory allegations most closely track the statutory language of subpart (3) of this section, respondents briefed, and the courts below ruled upon, that section.[23]

The Complaint alleges that respondents conspired to deprive Mr. Hoai of his property rights "by the use of the consent order and allegedly false testimony" in violation of 42 U.S.C. § 1985(3). Complaint, ¶ 48, A-401. But as noted by the courts below, section 1985(3) does not apply to all conspiratorial interferences with the rights of others; rather, "there must be some facial, or perhaps otherwise class-based, invidiously discriminatory animus

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[22]*See also Lugar*, 457 U.S. at 937 ("[w]ithout a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them").

[23]Petitioners do not address the adequacy of their section 1985(3) claim in their brief.

behind the conspirator's action." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).

The Complaint alleges that respondents' actions constituted an "invidious discrimination by which a rightful franchise holder is discriminated against in favor of an intruder. . . ." Complaint at ¶ 48, A-401. It does not allege that such actions were motivated by a racial or any other class-based animus. Under *Griffin* this omission is fatal to Count II. *See also United Bhd. of Carpenters v. Scott*, 546 U.S. 825, 836-39 (1983) (the Court declining to interpret section 1985(3) to encompass conspiracies motivated by commercial or economic animus).

III. PETITIONERS ARE NOT ENTITLED TO AMEND THE COMPLAINT

As noted above, petitioners first sought leave from the District Court to amend the Complaint approximately three months after it was dismissed and two months after petitioners perfected their appeal of that dismissal. Thus, their Notice of Appeal did not encompass their late-filed motion to amend.

During oral argument of their appeal, petitioners admitted that their complaint was "unartfully" (sic) pleaded, "weak," "not a good complaint," and "sloppy." A-59, 60, 63. They also admitted that their section 1985(3) claim "improperly left out a crucial allegation," namely, that the deprivation of rights they allegedly suffered "was because of racial prejudice." A-64.

As recognized by the Court of Appeals, the inadequacy of the Complaint is not the result of a "single misstep," *cf.*

Conley v. Gibson, 355 U.S. 41, 48 (1957), but of the absence of facts necessary to state a claim against respondents under Title 42. With respect to petitioners' section 1985(3) claim, an amendment could not change the fact that the Jones, Day defendants were representing one Vietnamese individual against another -- a fact which on its face precludes a claim of racial discrimination. Regarding petitioners' section 1983 claim, petitioners' brief offers no insight as to how an amendment might cure the fundamental shortcomings of the pleading. The proposed amended complaint submitted by petitioners with their motion for leave to amend alleges even more definitively than the original complaint that respondents *violated* District of Columbia laws, which, under *Lugar*, is fatal to such a claim. *See* Proposed Amended Complaint, ¶¶ 27, 33, 47, 48. Petitioners' theory continues to be that allegations that certain conduct abrogated state law may co-exist, in a valid section 1983 complaint, with allegations that such conduct was carried out under color of state law. Petitioners are wrong.

A party is not entitled to amend his complaint where such an amendment would be futile. See *Foman v. Davis*, 371 U.S. 178, 182 (1962). Petitioners have demonstrated the futility of attempting to amend this pleading.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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